

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

75-4159

75-4160

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA PAZ DE FERNANDEZ

Petitioner

- v -

IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

Docket No. 75-4159

JUAN FRANCISCO FERNANDEZ-BLENGIO

Petitioner

- v -

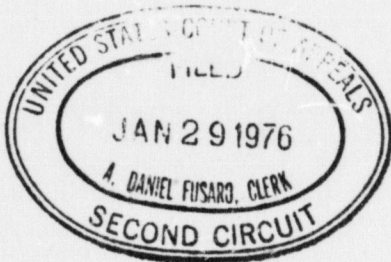
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PETITIONERS' JOINT BRIEF

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JANUARY 1976

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PETITIONERS' JOINT BRIEF

STATEMENT OF THE CASE

Petitioners Juan Francisco Fernandez ("Juan" in No. 75-4160) and Maria Paz de Fernandez ("Maria" in No. 75-4159), husband and wife, are natives and citizens

of Uruguay. Both entered the United States in 1969 as visitors. They overstayed their permitted time, and in 1973 they were served with orders to show cause why they should not be deported (R. 8a). At their joint deportation hearing (R. 4a-6a), they conceded deportability but they were given extended periods of voluntary departure to February 28, 1974 by the Immigration Judge (who was formerly known as the "Special Inquiry Officer" (R. 7a). On February 21, 1974, petitioners submitted to the District Director a joint application (R. 3a) for the withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act of 1952, as amended ("the Act"). This was in accordance with the prevailing regulation governing "asylum requests after completion of deportation hearing" see page 8, infra. The current regulation, 39 F.R. 41832, did not go into effect until December 3, 1974.

The views of the State Department (R. 11a-12a) were not furnished to the Special Inquiry Officer in connection with petitioners' asylum request.

The Immigration Judge on May 5, 1975 denied petitioners' application for asylum summarily treating

it as a motion to reopen without holding a hearing (R. 2a). The Board of Immigration Appeals on June 6, 1975 dismissed an appeal from that decision (R. 1a). This petition for review followed (R. 9a-10a).

On January 26, 1976, the United States Court of Appeals, Second Circuit ordered that Maria's petition for review be consolidated with Juan's and that petitioners' brief be filed by January 29, 1976.

STATUTES INVOLVED

The case involves the construction of Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h) and of the Operations Instructions thereunder, as they were in effect on October 1, 1974 when petitioners' applications to reopen their deportation hearings were filed requesting the relief of asylum under Section 243(h).

The current regulation governing asylum requests did not go into effect until December 3, 1974, 39 F.R. 41832, 8 C.F.R. 108.1 and 8 C.F.R. 108.2.

ARGUMENT

POINT I. The Immigration Judge was required to have held a hearing to adjudicate the petitioners' applications under section 243(h) after they were denied by the District Director.

The petitioners specifically applied for the withholding of deportation under section 243(h) and requested a hearing on their applications (R. 3a).

No hearing was held by the Immigration Judge. 8 C.F.R. 108.2 states, "A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of Section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees." (see page 11 *infra*).

* This regulation was in effect five months before the Immigration Judge made his decision denying their applications without a hearing. The petitioners were denied procedural due process of law.

POINT II. The Immigration Judge has failed to apply the Operations Instructions in his decision denying the motion to reopen.

The Immigration Judge was, by Operations Instructions, required to consider, on a motion to reopen, the proper standards then applicable to a claim for asylum. This, he did not do (R. 2a).

Instead he applied the more stringent standards of 8 C.F.R. 242.22; 103.5, pages 8 and 9 infra. Obviously, the Department of State letter was never furnished by the District Director to the Immigration Judge for his consideration as required (R. 11a and R. 12a)

This is quite clear since the Immigration Judge in his decision states "only respondents' affidavit was submitted..." (R. 2a).

Thus the decision of the Immigration Judge was contrary to the prevailing Operations Instructions and the Board of Immigration Appeals affirmed it in error (R. 1a)

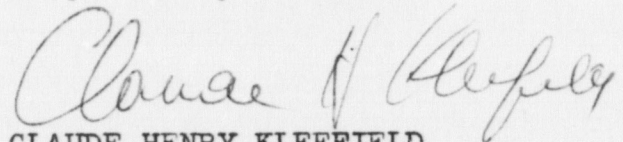
CONCLUSION

For the foregoing reasons, the Order of the Board of Immigration Appeals, affirming the

decision of the Immigration Judge should be vacated and the cause remanded for a hearing before the Immigration Judge to adjudicate the petitioners' applications under section 243 (h).

January, 1976

Respectfully submitted



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STATUTES AND REGULATIONS INVOLVED

Immigration and Nationality Act of 1952.

Section 106(a)(4) of the Act provides, in pertinent part:

"the Attorney General's findings of fact if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive".

Withholding of deportation

Sec. 243(h)

"(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Operation Instructions of the Immigration and Naturalization Service page 618.16, as of July 26, 1972.

*** (2) Asylum request during course of deportation proceedings. In any case in which deportation proceedings have been initiated and the alien or his representative introduces a request for asylum, the special inquiry officer shall postpone the hearing to enable the District Director to fully consider the bona fides of the request. If the District Director determines that asylum should be granted, the special inquiry officer shall be requested to terminate the proceeding and the alien shall be granted voluntary departure in increments of a year with permission to work. Each case shall be reviewed annually to determine if the need for asylum continues to exist and if any administrative remedy may be available to the subject.

In any case in which, after preliminary interview, it appears that there is clearly no basis for the alien's contention that

he would be persecuted if he returns to his home country, he shall be so informed and advised that he may present an application to the special inquiry officer for withholding of deportation under section 243(h) of the Act. In any such case in which the alien does not withdraw his request for asylum and indicates that he desires to present an application for withholding of deportation he shall be interviewed in depth and the District Director shall furnish full particulars by letter to the Office of Refugee and Migration Affairs, Department of State. No further action shall be taken in the alien's case until the views of that office have been received and presented to the special inquiry officer for consideration.

(3) Asylum request after completion of deportation hearing. In any case in which an alien who has not previously requested asylum or withholding of deportation under section 243(h), requests asylum after completion of a deportation hearing, the request shall be considered a motion to reopen the deportation proceedings in order to apply for withholding of deportation under section 243(h) of the Act. No fee shall be requested for such application and further proceedings shall be stopped until the application is considered by the special inquiry officer. The District Director shall have the alien interviewed in depth concerning his claim for asylum and shall furnish full particulars to the Office of Refugee and Migration Affairs, Department of State, requesting an expeditious expression of their views which shall be furnished to the special inquiry officer for his consideration.****

Reopening or reconsideration.

8 C.F.R. Sec. 103.5

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. When the alien is the moving party, a motion to reopen or a motion to reconsider shall be filed in duplicate, accompanied by a supporting brief, if any, and the appropriate fee specified by and remitted in accordance with the provisions of Sec. 103.7 with the district director in whose district the proceeding was conducted for transmittal to the officer having jurisdiction. When an officer of the Service is the moving party, a copy of

the motion shall be served on the alien or other party in interest and the motion, together with proof of service, shall be filed directly with the officer having jurisdiction. The party opposing the motion shall have 10 days from the date of service thereof within which he may submit a brief, which period may be extended. If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. Motions to reopen or reconsider shall state whether the validity of the order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. Rulings upon motions to reopen or motions to reconsider shall be by written decision. The filing of a motion to reopen or a motion to reconsider or of a subsequent application after notice of denial shall not, unless the Service directs otherwise, serve to stay the execution of any decision made in the case or to extend a previously set departure date.

Reopening or reconsideration.

8 C.F.R. Sec. 242.22

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of Sec. 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-323. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under Sec. 242.17 be granted if respondent's right to make such application was fully explained to him by the special inquiry officer and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the

basis of which the request is being made. The filing of an application for adjustment of status under Sec. 245 of the Act may be considered as the motion to reopen when the application shows new material not available or ascertainable at the time of the deportation hearing. The filing with a special inquiry officer of a motion under this section shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the special inquiry officer who has jurisdiction over the motion specifically grants a stay of deportation. In his discretion the special inquiry officer may stay deportation pending his determination of the motion and also pending the taking and disposition of an appeal from such determination.

PART 108 - ASYLUM

8 C.F.R. Sec. 108.1 Application

An application for asylum by an alien who is seeking admission to the United States at a land border port or preclearance station shall be referred to the nearest American consul. An application for asylum by any other alien who is within the United States or who is applying for admission to the United States at an airport or seaport of entry shall be submitted on Form I-589 to the district director having jurisdiction over his place of residence in the United States or over the port of entry. The applicant's accompanying spouse and unmarried children under the age of 18 years may be included in the application.

8 C.F.R. Sec. 108.2 Decision

The applicant shall appear in person before an immigration officer prior to adjudication of the application, except that the personal appearance of any children included in the application may be waived by the district director. The district director shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance. The district director may approve or deny the application in the exercise of discretion. The district director's decision shall be in writing, and no appeal shall lie therefrom. If an application is denied for the reason that it is clearly lacking in substance, notification shall be given to the Department of State, with opportunity to supply a statement containing matter favorable to the application, and departure shall not be enforced until 30 days following the date of notification. A case shall be certified to the regional commissioner for final decision if the Department of State has made a favorable statement, but, notwithstanding, the district director has chosen

to deny the application. If any decision will be based in whole or in part upon a statement furnished by the Department of State, the statement shall be made a part of the record of proceeding, and the applicant shall have an opportunity for inspection, explanation, and rebuttal thereof as prescribed in Sec. 103.2(b)(2) of this chapter. A denial under this part shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees.

(2)

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UNITED STATES ATTORNEY

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